Supreme Court, U. S.
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IN THE SUPREME COURT OF THE UNITED STATES

November Term, 1979

No. 79-1022

IRA L. PATRICK
and MAISIE S. PATRICK,
Petitioners

v.

COMMISSIONER OF
INTERNAL REVENUE,
Respondent

Petition for a Writ of Certiorari to the
United States Court of Appeals for the
Fourth Circuit

LEROY, WELLS, SHAW,
HORNTHAL, RILEY & SHEARIN

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

The Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in the above case on July 12, 1979.

OPINIONS BELOW

The opinion of the United States Tax Court has been officially reported in TC Memo 1977-153 (R.99). The opinion of the Court of Appeals for the Fourth Circuit has not yet been officially reported.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was made and entered on July 12, 1979 and copies thereof are appended to this petition in the Appendix at pp. 12-17. A petition for rehearing was denied on August 17, 1979. On September 28, 1979 the petitioner filed a petition for rehearing and suggestion for rehearing en banc with the Court of Appeals for the Fourth Circuit. The Court of Appeals for the Fourth Circuit denied this petition on October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The case before this Court is one of three companion cases which the Commissioner of Internal Revenue appealed from decisions in the United States Tax Court. In this particular case the United States Tax Court sustained deductions taken by the taxpayer for the cost of transportation and for the cost of meals and lodging incurred while working at a construction site in Lusby, Maryland. The Court of Appeals for the Fourth Circuit reversed. The question presented is:

Whether the Court of Appeals for the Fourth Circuit erred in holding that the taxpayer was not entitled to deduct living expenses, incurred at a construction site located away from his family residence in Creswell, North Carolina, and transportation expenses, incurred in

traveling between his place of employment in Lusby, Maryland and his family residence, as business expenses pursuant to Section 162 of the Internal Revenue Code of 1954, as amended.

STATUTES, FEDERAL RULES, and REGULATIONS INVOLVED

The pertinent portions of Section 162 of the Internal Revenue Code (26 U.S.C. 162) are set forth in the Appendix at p.2.

STATEMENT

This case is one of three companion cases which the Commissioner of Internal Revenue appealed to the Court of Appeals for the Fourth Circuit. In this case the United States Tax Court sustained deductions taken by the taxpayer for the cost of transportation and for the cost of meals and lodging incurred while working at a construction site in Lusby, Maryland.

The taxpayer, Ira L. Patrick and his wife, Maisie S. Patrick, reside in Creswell, North Carolina. The taxpayer has been a pipe-fitter and welder for twenty years. During the period January 1, 1974 to October 24, 1974 taxpayer was employed by Bechtel Power Corporation at the Baltimore Gas and Electric Company's Calvert Cliff Nuclear Plant project in Lusby, Maryland.

The taxpayer took the job in Lusby, Maryland because he was unable to work in his trade or business near Creswell, North Carolina. Throughout his stay in

Lusby he continued to look for work near Creswell. This search for employment close to home was carried out through his local union. (R.101) He made no commitment to his employer with regard to the length of his employment. He voluntarily quit the Lusby project on October 24, 1974 when he found work as a pipe welder with Tompkins-Beckwith, Inc. in Plymouth, North Carolina, about twenty-five miles from his home in Creswell. (R.101)

On their joint federal income tax return for 1974, the taxpayer and his wife claimed a business expense deduction in the amount of $8,162.00 for transportation, meals and lodging. The Commissioner disallowed the deduction and determined a deficiency of $1,802.75. (R.99)

The taxpayer and his wife have resided in Creswell for over forty years. They own a home in Creswell where they live with their children. The children attend school in Creswell. The taxpayer pays real estate taxes and income taxes in North Carolina; the taxpayers vote in North Carolina and they operate a business there. (R.67,101)

The taxpayer's North Carolina business involves eight mobile homes which the taxpayer owns in Creswell and which he leases out as rental property. His wife handles the rent collection and he does most of the maintenance work. The taxpayer returned to Creswell every weekend and he spent a considerable amount of time maintaining the mobile homes. Much of this maintenance was caused by the acid in the water which

continually eroded the pipes in the mobile homes, requiring constant attention. (R.82,101) During the week when the taxpayer was away at the Lusby project, the taxpayer's wife would collect rental payments and get help in emergencies. (R.76,101)

The United States Tax Court found that the taxpayer's employment in Lusby in 1974 was temporary (R.102) and it sustained the taxpayer's deduction.

In an opinion dated July 12, 1979, the Court of Appeals for the Fourth Circuit reversed the Tax Court decision. The basis for this reversal was the Court of Appeal's conclusion that this case and its companion cases were "indistinguishble" from the facts in Commissioner of Internal Revenue v. Peurifoy, 254 F.2d 483 (4th Cir. 1957), aff'd per curiam, 358 U.S. 59 (1958).

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because it erroneously interprets Section 162 of the Internal Revenue Code. Further, the decision rendered by the Court of Appeals for the Fourth Circuit in this case is in conflict with the decision rendered by the Court of Appeals for the Eighth Circuit in Frederick v. United States (No. 78-1853, August 8, 1979).

On August 8, 1979, more than fourteen days after the filing of the decision in the present case, the Court of Appeals for the Eighth Circuit issued an opinion in the case of Frederick v.

United States. The Frederick case, like the present case, involved the deductibility of the travel expenses of a construction worker who accepted employment at a large-scale construction project away from his permanent home. As in the present case, the question in Frederick was framed in terms of whether the job was "temporary" for tax purposes.

In its opinion in Frederick, the Eighth Circuit undertook an extensive survey of the applicable authorities on the question of when a job is "temporary." Based on those authorities, including the Peurifoy decision, the Eighth Circuit expressly rejected the position of the Government that travel expenses are non-deductible as a matter of law if the construction project is an extensive project or if the actual length of employment exceeds twelve months. Instead, the Court held that under the statutory framework, all facts and circumstances are relevant to the determination of whether travel expenses are ordinary and necessary business expenses incurred on a "temporary" job.

The Fourth Circuit Court of Appeals reversed the instant case as well as its two companion cases (Babeaux v. Commissioner and Waldrop v. Commissioner). In a single per curiam opinion (one judge concurring). The basis for reversal was stated by the panel as follows:

> We find the cases presently before us to be indistinguishable from Peurifoy, and accordingly, however sympathetic we may be to the taxpayers' position, we are compelled

> by Peurifoy to sustain the disallowance of the deductions sought by the taxpayers. (Slip Op., p.3)

It is simply not correct to say that the instant case is indistinguishable from Peurifoy. The only similarity between the instant case and Peurifoy is that each case involved a worker who accepted employment at a distant construction site where the project itself could last for a long period of time and where the worker in fact remained on the job for more than a year. On the other hand, the differences between the instant case and Peurifoy are numerous. Here, the evidence of record clearly demonstrates that Mr. Patrick had substantial economic and social ties to his home area and has worked in his trade in the vicinity of his home for over twenty years. Throughout his employment in Maryland, he continually searched for work at home. Job security was uncertain in Maryland, as evidenced by the large number of layoffs that occurred at any time without notice; and Mr. Patrick would have lost the substantial union seniority he had developed over two decades if he had moved permanently to his distant job. In addition, family housing was not adequate in the vicinity of the Maryland construction site. For business reasons, Mr. Patrick left the project in Maryland to take up his trade where he normally practiced it. Significantly, the taxpayers in Peurifoy failed to offer evidence on the existance of these or any other factors which would permit the court to determine whether their travel expenses were incurred as an ordinary and necessary part of their

trades or businesses.

Since the petitioners in the instant case have offered substantial (and essentially uncontradicted) evidence as to these additional factors, the decision of the panel in the Fourth Circuit in the instant case would appear to be explainable only if the panel assumed that the numerous additional facts present in the instant case but not present in Peurifoy are, as a matter of law, irrelevent for tax purposes. The inevitable corollary of that assumption would be that, as a matter of law, only two factors may be considered by the courts in determining deductibility: the expected duration of the project as a whole and the length of time the worker turns out to have remained on the job. As explained below, the Government explicitly argued to the Eighth Circuit that those two factors are controlling and, in an opinion filed August 8, 1979, the Eighth Circuit rejected the Government's position.

The incorrectness of the Fourth Circuit's decision is highlighted by the recently issued opinion of the Court of Appeals for the Fourth Circuit in Frederick v. United States (78-1853, Eighth Circuit, August 8, 1979). The Eighth Circuit case involved the deductibility of travel expenses of a worker at a distant construction project (an anti-ballistic missle site). In allowing the deductions, the Eighth Circuit stated:

> The determination of whether a job is temporary or indefinite is a factual question, and a court must

> examine all the facts and circumstances in reaching its decision. See, e.g., Peurifoy v. Commissioner, supra; Tucker v. Commissioner, 55 T.C. 783, 786 (1971). The Government's approach that one or two factors preclude deductibility as a matter of law would effectively foreclose this inquiry. (Slip Op. p.9)

The opinion in Frederick expressly addressed the two factors apparently relied upon by the Fourth Circuit in the instant case to deny deductibility: (1) the likelihood the project as a whole would continue for a substantial period of time, and (2) the length of time the taxpayer actually worked on the project. The Eighth Circuit held that neither factor precludes deductibility as a matter of law, and stated:

> The United States argues, initially, that the deduction should be disallowed as a matter of law since it was clear that the missile project would continue for a substantial period of time. In our view, the government's argument misses the point. The relevent fact is the taxpayer's prospects for continued employment. See, e.g., Boone v. United States, supra at 420; Cockrell v. Commissioner supra at 507. The Commissioner has recognized this on prior occasions:
>
> > How long a project as a whole may be expected to last, unless it is for a short time, is usually of no particular significance.

> The probable duration of the particular phase of the project on which the taxpayer expects to be engaged is an evidentiary fact to be weighed, but even that fact is not necessarily determinative. For example, if it were a known fact that the welding work on a large construction project would be expected to last over two years, it would not necessarily follow that every welder who works on a project expects to remain working there that long. Rev. Rul. 60-189, 1960-1, Cum. Bull. 60, 64.

The Government also argued that the deduction should be disallowed as a matter of law since Frederick actually worked on the project for a substantial period. This fact is not determinative of the issue. Cockrell demands that a court investigate the taxpayer's prospects of continued employment. In other words, a court must evaluate those facts available to a taxpayer at a point in time and determine, in light of those facts, whether employment was for a temporary or indefinite period. (Slip Op. pp.7-9, footnotes omitted)

The questions presented by this case are of great and recurring significance to all workers in the construction field. In light of the importance of this case and the divergence of opinions in the Fourth and Eighth Circuits, this case is

a particularly appropriate one for the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

LEROY, WELLS, SHAW,
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PROOF OF SERVICE

This is to certify that the undersigned has this date served this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit in the above entitled action upon all other parties to this cause by depositing a copy hereof in a post-paid wrapper in a post office or official depository under the exclusive care and custody of the United States Post Office Department, properly addressed to the attorney or attorneys for said parties.

This the 15 day of November, 1979.

John G. Gaw, Jr.

APPENDIX

SUPREME COURT OF THE UNITED STATES

November Term, 1979

No. _____

IRA L. PATRICK and MAISIE S. PATRICK,

Petitioner

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

SECTION 162(a) OF THE INTERNAL REVENUE CODE OF 1954, AS AMENDED

(a) IN GENERAL - There shall be allowed as a deduction all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade of business, including -

(2) traveling expenses (including amounts expended for meals and lodging other than amounts which are lavish or extravagant under the circumstances) while away from home in the pursuit of a trade or business.

T. C. Memo. 1977-153

UNITED STATES TAX COURT

IRA L. PATRICK AND MAISIE S. PATRICK, Petitioners v. COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 3701-76 Filed May 23, 1977

Ira L. Patrick and Maisie S. Patrick, pro se.

Eric B. Jorgensen, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

DAWSON, Chief Judge: Respondent determined a deficiency of $1,802.75 and an addition to tax under section 6653(a)[1] of $90.14 in petitioners' Federal income tax for 1974. Due to concessions by the

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1.

All statutory references are to the Internal Revenue Code of 1954, as amended and in effect for the taxable years involved, unless otherwise indicated.

parties, the only question remaining for decision is whether certain expenditures of petitioner Ira L. Patrick during 1974 are deductible as "traveling expenses * * * while away from home" within the meaning of section 162(a)(2).

FINDINGS OF FACT

Some of the facts have been stipulated. The stipulation of facts, together with the exhibits attached thereto, are incorporated herein by reference and are found accordingly.

Ira L. Patrick (petitioner) and Maisie S. Patrick (Maisie), the petitioners herein, resided in Creswell, North Carolina, at the time of filing their petition in this case. They timely filed their 1974 joint Federal income tax return with the Internal Revenue Service Center, Memphis, Tennessee.

Petitioner has been a pipefitter and welder for twenty years. From June 21, 1971, to October 24, 1974, he was employed in that occupation by Bechtel Power Corporation (Bechtel) of San Francisco. From June, 1971, to December, 1971, he worked on the Potomac Electric and Power Company nuclear power project in Newburg, Maryland. When this project closed on December 16, 1971, he was transferred to and worked on the Baltimore Gas and Electric Company's Calvert Cliffs nuclear power plant project

at Lusby, Maryland.

Petitioner worked for Bechtel in Newburg and Lusby because he was unable to find work in his trade or business in Creswell. Through his local union he sought work in North Carolina throughout his employment in Lusby. He voluntarily quit the project on October 24, 1974, when he found work with Tompkins-Beckwith, Inc., as a pipewelder on a construction project at Weyerhaeuser Company in Plymouth, North Carolina, which is approximately 25 miles from Creswell.

Petitioners' hometown is Creswell. They have lived there for over forty years. They own a home in Creswell where they live with their three children. The children attend school there. Petitioners pay real estate and income taxes in North Carolina; they vote there; and they operate a business there.

In addition to petitioner's job as a pipewelder, both petitioners own eight mobile homes in Creswell as rental property. Maisie handles the rent collection and petitioner does the maintenance work. When petitioner was transferred to Lusby, he returned every weekend and spent Saturdays and half days on Sundays maintaining and repairing the mobile homes and sites. Since Creswell does not have city water, the acid in the water continually erodes the pipes, requiring constant attention. If any emergencies occurred during the week, Maisie's uncle serviced them in petitioner's absence. Maisie never visited Lusby and depended on her husband to return to Creswell to tend the business and to spend time with his

family.

Petitioner made no commitment to the Lusby project as to length of employment and was told nothing concerning the duration of his assignment. His employment on the project was subject to termination at any time without notice at the discretion of the company. While on the project he rented a room in a rooming house during the week and returned to Creswell almost every weekend. The schools around Lusby were crowded and there was no suitable housing near the work site.

On their joint Federal income tax return for 1974, petitioner claimed business expense deductions of $4,300 (215 days at $20 a day for meals and lodging away from home); $3,714 (transportation); and $148 (tolls).

ULTIMATE FINDINGS OF FACT

1. Petitioner's employment in Lusby in 1974 was temporary.

2. Petitioner's "home" for tax purposes during 1974 was Creswell.

OPINION

At trial respondent conceded that petitioners have substantiated their claimed expenditures in the amount of $8,162 and that they are not liable for the negligence penalty. Petitioners have conceded the disallowance of taxes in the amount of $253. Petitioners have not shown that union dues ($272) and a tax preparation fee ($45) are adjustments to gross income rather than itemized deductions.

Section 162(a)(2) permits a deduction for "traveling expenses (including amounts expended for meals and lodging * * *) while away from home in the pursuit of a trade or business." Three conditions must be met to qualify for such a deduction. The expenses must have been ordinary and necessary, incurred while away from home, and incurred while in the pursuit of a trade or business. Commissioner v. Flowers, 326 U.S. 465 (1946). The narrow factual issue here is whether petitioner's expenses in Lusby were incurred "while away from home." Petitioner claims that Creswell is his "home." Respondent argues that petitioner was not away from home when he incurred expenses while working in Maryland. We agree with petitioner.

This Court has held that "home" for purposes of section 162(a)(2) is equated to a taxpayer's principal place of employment, even though his personal residence is elsewhere. Kroll v. Commissioner, 49 T.C. 557, 561-62 (1968); Bochner v. Commissioner, 67 T.C.No. 65

(1977). But where the employment is temporary rather than indefinite, we have recognized that a taxpayer's principal place of business is not his "tax home" within section 162(a)(2). Peurifoy v. Commissioner, 358 U.S. 59 (1958); Michaels v. Commissioner, 53 T.C. 269, 273 (1969), and cases cited therein. The purpose underlying this exception is to avoid the burden of duplicate living expenses while at a temporary job site. Tucker v. Commissioner, 55 T.C. 783 (1971). The interpretation of when a temporary job extends into indefinite employment is rendered more difficult by the myriad of cases on the subject, all turning upon consideration of the specific facts and circumstances of each case. Tucker v. Commissioner, supra at 786. Upon examination of these cases it becomes "apparent that neither reconciliation nor deduction of a universally applicable rule is possible." Whitman v. United States, 248 F.Supp. 845, 850 (W.D.La. 1965). As a result we have used our best judgment to weigh the facts herein to determine that petitioner prudently decided not to transfer his "tax home" to his job site. Relevant considerations include the nature of petitioner's specific job, the reasonableness of choosing to live away from his family resulting in duplicate living expenses, and the financial and familial contacts and interests the petitioner has with his original residence.

At all times the petitioner considered his assignment at Lusby to be temporary. He accepted fulltime employment away from home only when he was unable to find any work in his trade or business near Cres-

well. Throughout his assignment in Maryland he persisted in his efforts, with the aid of his union, to obtain a job near his home, family, and rental business. He made no commitments to the project as to length of employment and was informed by Bechtel that he could be laid off without notice at any time at their discretion. He voluntarily resigned from work on the Lusby project as soon as he located a job near Creswell.

While on the Maryland assignment petitioner lived in a rooming house and returned home every weekend to see his family and maintain the rental business he and his wife owned. Maisie had responsibility for collecting the rent from these eight mobile homes, but she depended upon petitioner to manage the other aspects of the business. He spent a considerable amount of time each weekend tending to these business matters, which involved repair and maintenance of each mobile home and surrounding property.

Petitioners lived in the same place for over forty years. They had family there. They voted there. They raised three children there. They paid property and income taxes in North Carolina.

While none of these facts is solely dispositive of the issue, the combination of all factors is significant to fortify our conclusion. Petitioner was involved in two jobs, one at Lusby and another at Creswell. He took great care to preserve the latter business during his temporary absences through constant attention to it on the weekends. We do not feel compelled to suggest that the petitioner forego one

business that is secure and producing steady income to move his tax home to a tandem job that is less stable and subject to termination at any time. This conclusion is bolstered by petitioner's long-time residency and economic ties with Creswell. We also think it significant that the lack of suitable housing and schools in Lusby, combined with the risky job situation there, acted as a deterrent to moving his family from their home, schools and community.

All things considered, we hold that Creswell, North Carolina, was petitioner's "home" within the meaning of section 162(a)(2). He is therefore entitled to deduct the expenses incurred for meals and lodging while in Lusby, Maryland, during 1974, and the transportation expenses incurred from Creswell to Lusby and return.

To reflect the conceded issues and our conclusions herein,

Decision will be

entered under Rule 155.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 78-1015

Dennis M. and Linda Babeaux, Appellees,

-versus-

Commissioner of Internal Revenue, Appellant.

No. 78-1018

Ira L. Patrick and Maisie S. Patrick, Appellees,

-versus-

Commissioner of Internal Revenue, Appellant.

No. 78-1019

James Marion Waldrop, Appellee,

-versus-

Commissioner of Internal Revenue, Appellant.

Appeals from the United States Tax Court.

Argued: March 7, 1979. Decided: July 12,1979

Before RUSSELL and PHILLIPS, Circuit Judges, and EDWARD DUMBAULD, Senior United States District Judge for the Western District of Pennsylvania, sitting by designation.

James A. Riedy, Tax Division, Department of Justice (M. Carr Ferguson, Assistant Attorney General, Gilbert E. Andrews and Richard Farber, Tax Division, Department of Justice on brief) for Appellant; James M. Waldrop, Pro Se; and Mark Maland for Appellees; Robert J. Jones (Paul S. Berger; Thomas C. Spring, Arnold & Porter on brief) for Amicus Curiae Building and Construction Trades Department, AFL-CIO.

PER CURIAM:

Each of the three cases before this court is an appeal by the Commissioner of Internal Revenue from a decision of the Tax Court in which the court sustained certain deductions taken by the respective taxpayers for the tax years 1973 and/or 1974. In general, each case involves a construction worker who accepted employment at a site away from his place of personal residence. The taxpayers lived near their places of employment during the week and ate their meals there, and then traveled to their personal residences for the weekend. There was no definite agreement as to the length of employment, but the construction projects involved were long-term nuclear power plants. The periods of employment ranged from 19 to 32 months, and in each case the taxpayer voluntarily terminated his employment for personal reasons. Taxpyers deducated as

business expenses under Section 162(a)(2) of the Internal Revenue Code of 1954 the cost of lodging and meals at their job sites, and the cost of transportation incurred in traveling between their places of employment and their personal residences.

In Commissioner of Internal Revenue v. Peurifoy (4th Cir. 1957) 254 F. 2d 483, 486-87, aff'd. 358 U. S. 59 (1958) (per curiam) this court had occasion to consider deductions claimed in circumstances almost identical to those in these cases. While recognizing that maintenance and travel expenses would be deductible when employment away from home was temporary and of short duration, the court held that such expenses were not ordinary and necessary business expenses and thus not deductible when the employment is of a substantial or indefinite duration. Finding that the taxpayers had failed to show that their employment was not of indefinite duration, the court sustained the Commissioner's deficiency determinations.

We find the cases presently before us to be indistinguishable from Peurifoy, and accordingly, however sympathetic we may be to the taxpayers' position, we are compelled by Peurifoy to sustain the disallowance of the deductions sought by the taxpayers. The judgments of the Tax Court are, therefore,

REVERSED.

DUMBAULD, Senior District Judge, concurring:

Starting from the incontestable assumption that the Tax Court surely knows more about tax law than I do, my inclination a priori would be to affirm its decision in favor of these taxpayers. Furthermore, the exercise of my independent judgment would lead me to the same disposition of the case at bar as the result of applying the law as actually enacted by Congress to the circumstances established in the record with respect to the situation of these taxpayers.

To me the able argument presented on behalf of the taxpayers was both impressive and convincing. Counsel's analysis of the complex array of cases on the topic, each of which ultimately depends on its own facts [Commissioner v. Flowers, 320 U.S. 465, 470 (1946)], deftly established the controlling principle that the deductibility vel non of travel and subsistence expenses turns on whether or not it was reasonable under the totality of circumstances for the taxpayer not to establish his home at the place of his employment.

At the one extreme are cases where maintenance of a residence elsewhere than at the place of work is purely for personal reasons, as in the case of a railroad lawyer preferring not to move to the city where his business headquarters was located. Commissioner v. Flowers, 320 U.S. 465, 473 (1946).

At the other extreme would be a telephone worker or atomic scientist visiting a locality stricken by hurricane or reactor failure, where the task is obviously

temporary and no facilities exist for establishing a household or participating in a stable family life.

Somewhere between falls the situation of the taxpayers in the case at bar. In my judgment the conditions and probable duration of their jobs, in the totality of circumstances proved on the record, reasonably justified their choice not to tear up their roots in the communities where they were established (one of them had lived there for four generations, another was operating a business) in order to relocate their families at the construction site. I do not view their actions as motivated by arbitrary personal preference, but by legitimate business judgment.

However, I do not regard the situation of the taxpayers in the case at bar as substantially different from that disclosed in Commissioner v. Peurifoy, 254 F.2d 483 (C. A. 4, 1957), and consider that precedent as precluding a decision here in favor of the taxpayers.

I accept the maxim of medieval Roman law that the gloss prevails over the statutory language: Quidquid non agnoscit glossa, id non agnoscit curia (What is not known in the gloss is not known by the court).[1] It would ill become a Yankee interloper (on too temporary a sojourn even to be regarded as a "carpetbagger") to dissent from settled Fourth Circuit jurisprudence. I therefore concur, for the

[1] See Dumbauld, The Life and Legal Writings of Hugo Grotius, 168 (1969).

reasons stated above, with the majority in reversing the Tax Court.

Supreme Court, U. S.
FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1979

IRA L. PATRICK AND MAISIE S. PATRICK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1022

IRA L. PATRICK AND MAISIE S. PATRICK, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

The question presented in this federal income tax case is whether petitioner Ira Patrick[1] was entitled to deduct living expenses, incurred at a construction site located away from his personal residence, and transportation expenses, incurred in traveling between his personal residence and his place of employment, as business expenses under Section 162(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.).

The pertinent facts are undisputed and may be summarized as follows: Petitioner was employed as a welder on the construction of a nuclear power plant near Lusby, Maryland, while maintaining his personal

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[1]Petitioner Maisie S. Patrick is a party solely because she filed joint income tax returns with her husband for the years at issue.

residence in Creswell, North Carolina. He lived near the construction site five days each week and returned to his personal residence on weekends (Pet. App. 4-6). At the time petitioner began work on the power plant, he did not know how long the employment would last and he did not have an employment contract (Pet. App. 6). He worked at that construction site for approximately 34 months before he voluntarily terminated his employment (Pet. App. 4-5).

On his 1974 federal income tax return, petitioner claimed a business expense deduction of $8,162 under Section 162(a)(2) of the Code for the cost of meals and lodging incurred while living near the construction site and the cost of travel between the construction site and his personal residence in Creswell, North Carolina (Pet. App. 6). On audit, the Commissioner of Internal Revenue disallowed the deduction and determined a deficiency of $1,802.75 (Pet. App. 3). In this action brought by petitioner for redetermination of the deficiency, the Tax Court held that petitioner's employment at the construction site was "temporary," and that his living expenses and transportation costs were therefore deductible business expenses (Pet. App. 3-10). The court of appeals reversed. It ruled that petitioner had failed to show that his employment was not of indefinite duration. The court concluded that its previous decision in *Commissioner* v. *Peurifoy*, 254 F. 2d 483 (4th Cir. 1957), aff'd, 358 U.S. 59 (1958), was controlling on the question of deductibility of such expenses (Pet. App. 11-13).

1. The court of appeals correctly held that petitioner's living and travel expenses were not deductible. Section 162(a)(2) allows a deduction for traveling expenses, including amounts expended for meals and lodging, incurred by a taxpayer while away from home in the pursuit of a trade or business. For federal income tax purposes, a person's home is his principal place of employment, not where his personal residence is located. *Owens* v. *Commissioner*, 50 T.C. 577, 580 (1968); *Kroll* v. *Commissioner*, 49 T.C. 557, 561-562 (1968). If a taxpayer elects for personal reasons to reside away from his place of employment, traveling and living expenses incurred as a result of such an election are considered nondeductible personal expenses. *Commissioner* v. *Flowers*, 326 U.S. 465 (1946). See Section 262 of the Code.

The only exception to the rule that expenses of transportation from a residence to a place of employment and living expenses, incurred by a taxpayer because he resides away from his place of employment, are nondeductible personal expenses is when the taxpayer's employment is temporary in duration. *Commissioner* v. *Peurifoy*, *supra*; *Blatnick* v. *Commissioner*, 56 T.C. 1344, 1348 (1971); Rev. Rul. 60-189, 1960-1 Cum. Bull. 60.[2] With respect to temporary employment, the taxpayer's "tax home" is deemed to be his personal residence despite the fact that his business is at another location.

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[2]Employment is considered temporary only if it can be expected to last for a short period of time. *Tucker* v. *Commissioner*, 55 T.C. 783, 786 (1971). Even if it is known that a particular job may or will terminate at some future date, that job is not considered temporary for purposes of Section 162(a)(2) if it is expected to last for a substantial or indefinite period. *Ford* v. *Commissioner*, 227 F. 2d 297 (4th Cir. 1955); *Jones* v. *Commissioner*, 54 T.C. 734 (1970), aff'd, 444 F. 2d 508 (5th Cir. 1971); *Boone* v. *United States*, 482 F. 2d 417 (5th Cir. 1973); *Slegers* v. *United States*, 603 F. 2d 225 (9th Cir. 1979) (table); cf. *Frederick* v. *United States*, 603 F. 2d 1292 (8th Cir. 1979).

Accordingly, a taxpayer engaged in temporary employment located away from his personal residence is considered to be "away from home" for purposes of Section 162(a)(2). Living and transportation expenses incurred in pursuit of temporary employment are therefore deductible business expenses.

As this Court recognized in *Commissioner* v. *Peurifoy*, *supra*, 358 U.S. at 60-61, the question whether a taxpayer's employment is temporary or indefinite is factual. Review by this Court of the decision below would therefore be inappropriate. At all events, the facts of record recounted above amply support the court of appeals' determination that taxpayer's employment at the construction site was of indefinite duration.[3]

2. *Frederick* v. *United States*, 603 F. 2d 1292 (8th Cir. 1979), aff'g 457 F. Supp. 1274 (D.N.D. 1978), upon which petitioner relies (Pet. 7), does not conflict with the decision below. In *Frederick*, the court applied the same legal standards as the decision below in determining whether the taxpayer's employment was temporary or indefinite. There, as here, the court recognized that the ultimate determination whether a taxpayer's employment is temporary or indefinite is a question of fact. The court's conclusion in *Frederick* that the taxpayer's employment was temporary merely reflects its application of the same legal principles to the different factual

[3]The instant case was consolidated for briefing and argument with two other cases involving the same issue presented in similar factual settings. See *Babeaux* v. *Commissioner*, 36 T.C.M. 657 (1977), and *Waldrop* v. *Commissioner*, 36 T.C.M. 780 (1977). On December 10, 1979, this Court denied certiorari in *Waldrop* (No. 79-5418).

circumstances involved in that case. Thus, while the two courts reached different results, their decisions do not conflict.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

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